Is Discrimination Elusive?

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PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION. By Ian Ayres.** Chicago: University of Chicago Press, 2001. 433 pp. + xi.

CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY. Edited by Francisco Valdes,† Jerome McCristal Culp‡ & Angela P. Harris.§ Philadelphia: Temple University Press, 2002. 414 pp. + xxi.

INTRODUCTION

The fine reviews included in this Symposium stake out various positions on whether discrimination is elusive. At one extreme, Rachel Moran claims that after reading 800 pages she still doesn't even know what discrimination means.[1] At the other, Kevin Haynes claims that "for millions of black Americans [there is] no question at all.... [R]ace discrimination is pervasive...."[2]

This essay claims that the conceptual core of race discrimination—what I will call race-contingent behavior—is not elusive in the sense of being

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1. Rachel Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2366 (2003).

2. Kevin Haynes, *Taking Measures*, 55 STAN. L. REV. 2349, 2352 (2003).

undefined or somehow ineffable.[3] Indeed, discrimination in this sense is not just knowable, it is increasingly known. There is mounting evidence that race-contingent decisionmaking is still a pervasive factor in many (but not all) facets of everyday life.

There are more elusive types of discrimination as well, flying under divers monikers such as "institutional discrimination" and "unjustified disparate impacts." Indeed, my book devoted two chapters to ferreting out evidence that race-neutral decisions had produced unjustified disparate racial impacts in the kidney transplant and criminal bail-setting contexts. Let me be clear: I continue to support retaining disparate impact as a viable cause of action. Nonetheless, I stand by my admittedly controversial claim: "There may come a time when race-contingent behavior as an empirical matter recedes to such an extent that institutional discrimination becomes the dominant source of racial disability. But it is my sense that that time has not yet come."[4]

Race-contingent behavior should not simply be asserted. It needs to be continually reestablished by ongoing testing and ongoing scrutiny of test results. In many contexts, it is difficult for individuals to know whether they are the victims or the beneficiaries of discrimination because they do not know how other types of people are treated. It is too easy for some to say that discrimination is a thing of the past or that discrimination is pervasive.

My view is that objective evidence of race-contingent decisionmaking is knowable if we as a society have the will to go out and look for it. I believe we

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3. AYRES, p. 426. In this Reply, I will focus primarily on issues of race discrimination. *But see infra* text accompanying note 12 (discussing intersectionality). The "race-contingent" construct for discrimination has obvious analogs to other forms of discrimination, e.g., "sex-contingent."

The focus on race continues a pattern in my book that Clark Freshman kindly brought to my attention. Clark Freshman, *Prevention Perspectives on "Different" Kinds of Discrimination: From Attacking Different "Isms" to Promoting Acceptance in Critical Race Theory, Law and Economics, and Empirical Research*, 55 STAN. L. REV. 2293, 2294 (2003) ("[T]he Ayres book includes several studies but only two of them look at women at all—and both conclude that women in general don't face discrimination in either car sales or bail rates." (footnote omitted)). On reflection, it has been striking to me how many people have read my car empiricism (or third-party reporting on the empirical studies) as evidence that white women are discriminated against. Mary Anne Case, for example, reports that my study impeded her from buying a car. Mary Anne Case, *Developing a Taste for Not Being Discriminated Against*, 55 STAN. L. REV. 2273, 2274 (2003). Indeed, my study probably got more play in the mass media because it was read to include an enlarged victim class that included white people. I now see that, at the very least, my titles played a role in this misreading. The subtitle really should not say "Unconventional Evidence of . . . Gender Discrimination." By way of explanation, there was evidence of gender discrimination in my original "pilot study." In that study, dealerships offered systematically higher prices to African-American women than to African-American men. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991). I had originally submitted the subtitle "Unconventional *Tests* of Gender Discrimination" for publication, but late in the day yielded to the request of my Chicago Press editor to substitute the word "Evidence."

4. AYRES, p. 426.

should. However, Clark Freshman has raised deep concerns about the "test and publicize" approach that I advocate. The last Part of this Reply grapples with his concern that publicizing discrimination may actually exacerbate the problem.

I. RACE-CONTINGENT BEHAVIOR AS A CORE CONCERN

Just as the names of various subordinated groups have changed over time,[5] it might be appropriate to use alternative words instead of "discrimination" (or "prejudice" or "racism"). To a degree, one must sympathize with Professor Moran when she claims to still not know what discrimination means. It can mean so many things—both legally and in other contexts. But at its moral and conceptual core, discrimination is still concerned with disparate treatment because of race.

Even the term "disparate treatment" raises important questions about the intent of the decisionmaker. These are not merely nice legal questions of whether the defendant had the requisite mens rea. Much of the disparate treatment that goes on today is probably not by decisionmakers who know that race is influencing their decision. Unconscious disparate treatment looms large.

But while understanding the conscious or unconscious motivations for disparate treatment may be very important in crafting a remedy, the moral and social concerns with the harms of racial subordination are largely independent of the decisionmaker's mens rea. Accordingly, I believe that the civil rights movement should focus on evidence of race-contingent decisionmaking. To my mind, if a researcher or litigant or public official can show that a decision was contingent on someone's race, this without more should be sufficient to raise grave civil rights concerns.

To be sure, at times there are important practical difficulties in inferring whether or a not a particular decision was race-contingent. To be confident that a decision was race-contingent, we must be able to control either with testers or

5. Clark Freshman raises the issue of whether I inappropriately used the phrase "shed light on a dark corner." Freshman, *supra* note 3, at 2322 (quoting AYRES, p. 48). I admit error. I remember reading the phrase in galleys and briefly wondering whether my light/dark metaphor was misplaced in a book on civil rights. It is difficult to accurately reconstruct what led me to retain the phrase. My general view is that it is appropriate to give subordinated groups the power to change our language with regard to subordinated group references (and to give representatives of the subordinated groups substantial autonomy to do so as often as they wish). To me, the altered usage has the same value as a changed password. By hewing to the new usage, a speaker signals that she has been paying attention to the subordinated community. Accordingly, in conversation, I tend to begin with the phrase "African American" and then later on may switch at times to "black vs. white" testers. My choice to use the "light/dark" metaphoric contrast was likewise probably prompted in part by its position on page 48. But my password conception of usage would not countenance the usage of all throwback terms. Professor Freshman has convinced me that using such a tired metaphor was neither convenient nor necessary.

with regressions for nonracial characteristics that might have influenced the decision. But we should resist the temptation to think that this core conception of discrimination is not adequately theorized.

Similarly, we should resist the postmodern turn of questioning the reality of race *at least for the limited purpose of testing for race-contingent decisionmaking.* Many aspects of race are socially and individually constructed. Critical race scholars (CRS) have shown that understanding the complexities of how race is performed is important to fully understand privilege.[6] But it is literally impossible for a court to enforce a disparate treatment prohibition (or for government to implement an affirmative action program) if it denies that race is an objective reality. As Henry Louis Gates noted:

> To declare that race is a trope, however, is not to deny its palpable force in the life of every African-American who tries to function every day in a still very racist America. In the face of Anthony Appiah's and my own critique of what we might think of as "black essentialism," Houston Baker demands that we remember what we might characterize as the "taxi fallacy."
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> Houston, Anthony, and I emerge from the splendid isolation of the Schomburg Library and stand together on the corner of 135th Street and Malcolm X Boulevard attempting to hail a taxi to return to the Yale Club. With the taxis shooting by us as if we did not exist, Anthony and I cry out in perplexity, "But sir, it's only a trope."[7]

I take exception to Professor Haynes's claim that "Ayres remakes race and gender in the image of what he wants to describe as such."[8] In fact, I suggested that we might use audit testing as a way of objectifying perceived race for affirmative action purposes in the rare case when the self-reported race is contested. It is relevant to the determination of social disadvantage if the vast majority of people in the Implicit Association Test (IAT) would sort an applicant's picture into one racial group instead of another.[9] As suggested by Gates, race may be a contestable trope for many purposes, but a showing that cabs are less willing to stop for a person who is consistently sorted in the IAT to be African-American relative to a person who is consistently sorted in the IAT to be European-American is hardly an effort to remake race to my own desire.

The ability of third parties to consistently sort an individual into a particular racial category is empirically contingent. I make no claim that third-party sorting leads to an inevitably objective answer. Indeed, there are cultures

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6. *See, e.g.*, Devon W. Carbado, *Straight out of the Closet: Race, Gender, and Sexual Orientation*, *in* CROSSROADS, p. 221; *see also* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

7. HENRY LOUIS GATES, JR., LOOSE CANONS: NOTES ON THE CULTURE WARS 147 (1992).

8. Haynes, *supra* note 2, at 2354.

9. *See* https://implicit.harvard.edu/implicit/demo/ (last visited June 13, 2003).

and time periods in which third-party sorting tests of race would not yield valid racial predictors. But my strong sense in the United States in 2003 is that third parties can easily sort most self-identified non-Hispanic whites and blacks into two separate piles.

In 1987, law professor Gerry Spann sued Colonial Village alleging that advertising campaigns in *The Washington Post* featuring exclusively white models indicated a racial preference in violation of the Fair Housing Act.[10] At trial, an employee of the defendant claimed that the race of its models was indiscernible from the pictures used.[11] The plaintiff forced the witness on cross-examination to make untenable claims of racial ignorance by proffering blown-up photographs of the models from the advertisements as well as well-known figures (including former Washington mayor Marion Barry). The defendant's claims of being literally race-blind were met with open ridicule by the jury and the court.

All this is to say is that, as an empirical matter, it is not necessary to rely on either self-reporting or on eugenically distasteful sanguinity standards in order to have a valid measure of race. In short, race is often, nay usually, knowable and unproblematic for the limited purposes of testing race-contingent behaviors.

II. TESTING INTERSECTIONS

One of the important contributions of contemporary critical scholarship is its insistence on broadening the scope of the inquiry to analyze how race interacts with other potential markers for subordination.[12] But testing for "intersections" poses a pragmatic problem for quantitative empiricists. First, the insistence on attention to intersections plays into the hands of the defendants who, under the rubric of "omitted variable bias," argue that any regression is not adequately controlled. The defendant, like the intersectionalist, will argue that the decision was not driven by race but by some other (nonactionable) characteristic. Thus, somewhat bizarrely, the quarter of my car tests pairing African-American women with white males might not be sufficient to prove race discrimination—notwithstanding the markedly higher offers received by African-American women—because the putative defendants could always argue that they discriminated, not because the buyers were black (which arguably violates §§ 1981 and 1982), but because they were female (which is not actionable under federal law). However, at the end of the day, good quantitative empirical testing for disparate racial treatment needs to control for plausible nonracial variables. So, the "omitted variable

10. Spann v. Colonial Vill., Inc., 662 F. Supp. 541 (D.D.C. 1987).

11. Interview with Niki Kuckes, Counsel for Plaintiff, in Washington, D.C. (Oct. 25, 2002).

12. *See, e.g.*, CROSSROADS, p. xvii.

bias" is not exclusively a concern of intersectionalists, but rather is an issue whenever one seeks to draw conclusions from limited data.

A second difficulty with the claims of intersectionalists is what I will call a "degrees of freedom" problem. A central critical claim is that it is not sufficient merely to look for an overarching race effect or a single gender effect (or single class effect or single sexual orientation effect). Rather, we should often expect that the treatment of (poor, heterosexual) African-American women will not merely be the sum of the predictions of how "women" and "African Americans" are treated. Conceptually quantitative empiricists know how to test for independent intersection effects. By interacting different race and gender indicator variables, for example, it is possible to test for individual differences in all the race/gender permutations existing in the data. And indeed, this is just what I have done in both the car and bail studies.[13]

But problems arise because each additional intersection causes the number of permutations to grow exponentially. If I wanted to separately estimate the expected treatment of five races by two sexes by five classes by four sexual orientations, I would need to estimate 200 different effects (5x2x5x4=200). This creates a degrees of freedom problem because the number of observations in a data set limits the number of effects that can be estimated. If you have only 150 observations, you literally cannot estimate 200 effects. Estimating effects for more refined subgroups, in short, requires more data. And sometimes the data is simply not there. When the intersection regressions do not reject the findings of the simpler (one race effect, one gender effect) regressions, it is often more appropriate to go forward with those simpler regressions that do not estimate the intersections.

A final difficulty with intersectionalism arises in the audit context—when intersectionalists want to know how race interacts with other variables. For example, Professor Haynes wonders what would have happened if he went to a dealership "wearing a FUBU-logoed sweatshirt."[14] My studies produced strong evidence of race-contingent offers for prepped-out testers, but Professor Haynes wonders whether the discrimination would persist if I had compared differently dressed testers. Indeed, I wondered the same thing, and this motivated my investigation of consummated purchases,[15] but I emphasized then, and I continue to emphasize now, that "separate but equal" bargaining outcomes still represent an important form of disparate treatment.

III. SELF-EVIDENCE OF DISCRIMINATION

The pragmatic difficulty of testing intersections between race and other markers of subordination is not just a problem for quantitative empiricists.

13. *See, e.g.*, AYRES, p. 284.

14. Haynes, *supra* note 2, at 2356.

15. AYRES, p. 91.

Inferences drawn about intersections require more information for qualitative, historical, and narrative empiricists as well.

It is a completely legitimate use of narrative to explore the meaning of intersectionality from the perspective of the person being subordinated. But it is much harder to use a narrative of the victim to explore the extent to which the decisionmaker was engaging in race- and/or gender- (and/or class-, etc.) contingent behavior.

Professors Case, Freshman, and Haynes all point out that the CRS analyses have centered more on the victim, while my studies have focused more on the potential discriminators. This difference in focus seems to be a natural outgrowth of our different concerns—both of which are essential to filling out our knowledge of racial (and other forms of) subordination.

But Professor Haynes goes beyond merely valorizing (as I do) the appropriate uses of critical scholarship. He seems to challenge the need to use quantitative social science to corroborate preexisting beliefs about discrimination. Instead, Professor Haynes suggests that we should rely to a much greater degree on what he calls "self-evidence of discrimination":

> [W]hat remains a question for Ayres—*Pervasive Prejudice ?*—is for millions of black Americans no question at all. Black Americans overwhelmingly believe that race discrimination is pervasive. . . . But our self-evidence will not stand up in any court of law, or even, it seems, in the court of public opinion, in part because "minority consumers have imperfect information about how their white counterparts are treated." What black America locked outside of retail markets gleans from looking in on white America happily going about its Christmas shopping is not enough.
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> . . . [B]lack self-evidence of discrimination counts for very little . . . .[16]

This is a truly bizarre criticism. In the third paragraph of my book, after describing a *Saturday Night Live* sketch with Eddie Murphy, I write:

> In the *Saturday Night Live* sketch, the whites knew about the discrimination and blacks were kept in the dark. But I believe . . . *the opposite is closer to the truth*. . . . People of color have better insights into what is and what is not normal service and hence are better attuned to the possibility of race discrimination.[17]

To my mind, any fair reading of the book would indicate my view that African Americans are better situated to infer the existence of discrimination.

However, apart from this minor interpretive issue, Professor Haynes and I definitely do part company on the value of "self-evidence." If the evidence is literally about only oneself—that is, if it is literally "self" evidence—it can tell you nothing about race discrimination. Only evidence that compares the treatment of different people can help us discern disparate treatment. Individuals can certainly acquire this type of evidence. The core of the

16. Haynes, *supra* note 2, at 2352 (citation omitted).

17. AYRES, pp. 1-2 (emphasis added).

Benetton story is not simply that Professor Williams was locked out, but that she could see the disparate treatment of whites shopping inside.

Contrary to Professor Haynes, I continue to believe that "knowledge about how other similarly situated people are treated is a crucial barrier to learning whether (and the extent to which) discrimination exists."[18] For example, imagine that an African American who is *actually* speeding (say, going 70 in a 55 mph zone) is pulled over and ticketed. How is she supposed to know whether the officer would have let her slide with just a warning if she were white? Or imagine that a store declines the request of a Hispanic customer to use the bathroom or to return a sweater without a receipt. It is very difficult to determine whether a particular refusal was motivated by race or not. I think Professor Haynes and I would be in agreement that being exposed to a longstanding pattern of police or retail behavior would allow an individual person of color to infer that in the aggregate there must be disparate treatment, but it would remain difficult for the individual to infer disparate treatment in his or her individual case because he or she still has imperfect information about how a similarly situated person would have been treated.

I think Professor Haynes and I also disagree on how great a presumption of truth to give to the beliefs of subordinated people. This highlights a methodological difference between social science and outsider scholarship. If a core method of feminism is to begin by believing what women say, and a core method of CRS is to listen to the voices of minorities, social science (and particularly econometrics) in contrast gives primacy to direct observation of what people do.

From a social science perspective, it is not sufficient to merely rely on the reported beliefs of African Americans, just as I would not rely on the reported beliefs of whites concerning whether they have been passed over in hiring or promotion because of affirmative action.[19] Indeed, Professor Case reasonably argues that reliable knowledge of at least some disparate treatment in the aggregate may cast a pall over some fraction of outcomes that are in fact not driven by discrimination. One of the important harms of episodic discrimination may very well be the way it creates uncertainty about when discrimination does *not* occur.

And even if African Americans already knew something was terribly wrong with automobile sales, it is unlikely that they had very good evidence about *the size* of the problem. Was the differential pricing a matter of $50, $500, or $5000?

Or imagine what it is like to be a black cab driver. You might reasonably be concerned—or already know in some sense—that your passengers would tip

18. AYRES, p. 2.

19. *See, e.g.*, Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002) (arguing that far fewer whites are hurt by racial affirmative action than whites often think).

you less because of your race. But how much less? And can we confidently predict that African-American passengers—embracing the FUBU ethos[20]—would discriminate in favor of black cab drivers?[21] Self-evidence is not well suited to answer the "how much" or "to what extent" questions.

One point on which Professor Haynes and I do agree is that both numbers and pictures can be manipulated to mislead. We must be wary of false objectivity. But this, of course, is a problem with all types of evidence. And it is equally true of personal narratives.[22] Indeed, it is amazing that Professor Haynes attacks the objectivity of numbers and pictures, while not questioning the objectivity of the Benetton narrative or Gallop polling of African Americans.

I am an empirical pluralist. It is better to test for the presence of discrimination using diverse methodologies that interrogate diverse sources of information. Pictures and personal narratives can see things that a regression never can. Moreover, a robust finding across very different kinds of studies deserves more credence than any individual method.

Because any method may be subject to either purposeful or inadvertent manipulation, it is useful to subject all to scrutiny. This is true for regressions[23] and photos as well as narratives and victims surveys. Of course, we need to find out whether Texaco executives really were caught on tape using racial epithets.[24] But we also need to interrogate whether "self-evidence" is susceptible to alternative hypotheses. Professor Case describes an episode of *Monk* that actually provides a plausible (albeit unlikely) nonracial explanation for why Professor Williams was locked out of Benetton.[25] And Professor Freshman describes a *New York Times Ethicist* column where even a direct

20. Haynes, *supra* note 2, at 2356.

21. Stay tuned. I hope to submit a statistical analysis of taxicab tipping in 2003. *See* Ian Ayres, Fredrick E. Vars & Nasser Zakariya, To Insure Prejudice: Racial Disparities in Taxicab Tipping (working paper, available at http://www.ssrn.com).

22. *See* Janet E. Halley, *Truth/Value*, 4 YALE J.L. & FEMINISM 191 (1991) (book review). As I have earlier noted, "victim descriptions of an offender's race are not incontestable facts—at most the police can infer that such descriptions are highly correlated with an offender's actual race. 'Victims' such as Susan Smith and Charles Stuart sometimes intentionally [misdescribe] the race of the offender (to divert attention from themselves as the real criminal) . . . ." AYRES, p. 416.

23. John Donohue and I have recently devoted considerable effort to interrogating the concealed weapons empiricism of John Lott. *See* Ian Ayres & John J. Donohue III, *Shooting Down the More Guns, Less Crime Hypothesis*, 55 STAN. L. REV. 1193 (2003).

24. Apparently they were not. *See* Michael Kelly, *TRB from Washington: The Script*, NEW REPUBLIC, Dec. 9, 1996, at 6; Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. (forthcoming April 2003) (manuscript at 23 n.79) (noting that the tape was initially mistranscribed).

25. Case, *supra* note 3, at 2286.

admission of race-contingent behavior against an Asian job applicant is questioned for its veracity.[26]

Finally, I stand by my claim that pictures of disparate treatment are uniquely powerful. Yes, like *Time*'s picture of O.J. Simpson, they can be manipulated. And I myself worried that the *PrimeTime Live* audits could be manipulated simply by showing nonrepresentative instances of relatively unfavorable African-American treatment.[27] But more often—like the film of Rodney King's beating—pictures constrain manipulation.

Numbers can be manipulated. But they can also tell powerful stories. Quick, what does the number "41" make you think of? My mind immediately turns to the number of shots unleashed on Amadou Diallo.[28] Far from being antagonistic to personal accounts, the numbers can powerfully complement narrative by expressing the extent to which an individual narrative is *representative* of a larger phenomenon.

Professor Haynes suggests that there may be a degree of racism involved in white America's unwillingness to believe the self-evidence of African Americans. He is surely right. But if we want to convince the general public and lawmakers that disparate treatment is still very much with us, it is all the more important to come forward with evidence that is less easily dismissed. Nonracists might reasonably demand more than self-evidence. But especially if racism is causing white America to undervalue black self-evidence, an education strategy must include types of evidence that can more easily be heard by people harboring racist preconceptions. Preaching to the choir is rarely effective.

IV. SHOULD DISCRIMINATION BE ELUSIVE?

The good news is that evidence of race-contingent decisionmaking need not be elusive. Well-controlled audit tests and regressions can provide strong evidence of race-contingent decisionmaking.[29] But such tests need to be conducted on an ongoing basis in a variety of markets if we are going to continually reestablish whether disparate treatment is a quotidian event in the lives of African Americans and other minorities. My book joined the call of

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26. Freshman, *supra* note 3, at 2303.

27. AYRES, p. 2 n.1.

28. Bruce Springsteen wrote the song "American Skin (41 Shots)," which focuses on the inexplicably large number by simply chanting it over and over again. *See* Chris Nelson, *Springsteen, Public Enemy, Le Tigre Fire Back at Diallo Shooting*, MTV NEWS, *at* http://www.mtv.com/news/articles/1442426/20010402/springsteen_bruce.jhtml (Apr. 4, 2001).

29. Indeed, *Pervasive Prejudice* also suggested a new method for establishing discrimination at employment and real estate agencies—which I call a "principal audit"—where a single tester would approach the agency feigning to be an employer or landlord and see if the agency discriminated on its principal's behalf in racially filtering applicants.

others for a national report card on race discrimination—with more testing in more markets.

The grand normative strategy of the book might be described as "test and tweak"—that is, (1) engage in an aggressive regime of market testing, and (2) use the results of the test to justify legal intervention in the markets (where the evidence warrants). For example, in the automobile market, I suggested that a variety of interventions including mandatory disclosure of a dealership's markup and possibly even markup caps might be appropriate. Professor Freshman refers to my proposed interventions as "market tweaking"—which I think accurately reflects my general inclination to harness market forces to disable or deter discriminatory preferences (or the incentive to use race-contingent decisionmaking to enhance profits).[30] But I take exception to his categorization of my proposals as being narrow and atomistic. After all, I called for a national regime of broad-based testing. I proposed prohibiting race and sex discrimination (both disparate treatment and unjustified disparate impacts) with regard to the sale of all goods and services. And I have also suggested that quantitative evidence of disparate treatment in private markets could be used to justify public affirmative action.[31] Indeed, in contrast to Professor Freshman's characterization, Professor Moran sees my reform project as being "structural."

But regardless of whether the "test and tweak" strategy is broad or narrow, Professor Freshman raises the very fundamental question of whether raising public awareness about the continuing extent of disparate treatment might be counterproductive. Trying to raise sensitivity via various types of diversity training might produce a predictable kind of "special rights" backlash. Indeed, Professor Freshman's argument could even suggest that it was counterproductive for me to publish my results on car discrimination. "What will car salespeople do when they read that dealer after dealer, [and]

30. Professor Moran suggests that my book would have been stronger if it had provided a general theory of when market competition deters or embeds discrimination. As I noted in passing, there certainly is a superficial tension between my claim that competition among literally hundreds of Chicagoland car dealers fails to drive out discrimination and my claim that competition among nine bail dealers alleviates a substantial portion of the economic effects of judicial discrimination. AYRES, p. 257 n.72. I do, however, provide at least the beginning of a theory in suggesting that aggressive seller competition under conditions of full information will tend to drive out disparate treatment that is unrelated to sellers' actual costs of doing business. AYRES, p. 80.

31. AYRES, p. 399; Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?* 98 COLUM. L. REV. 1577 (1998). If private buyers refuse to purchase pencils from minority producers, the government might be justified in increasing its pencil purchases to counteract the private discrimination. But note also that qualitative evidence including narrative would not and should not by itself satisfy the constitutional requirement that a particular remedy, say a 10 percent bidding credit, was "narrowly tailored" to remedy the particular government interest.

salesperson after salesperson, quotes much higher prices to African Americans? . . . [Some may themselves] offer worse prices . . . ."[32]

Salespeople who were not discriminating may suddenly feel that they were suckers for not following the industry norm.[33] Just as publicity about widespread tax cheating may actually cause *more* cheating by making it seem more acceptable,[34] publicity about the pervasiveness of disparate racial treatment may lead decisionmakers to think it is more acceptable, perhaps even expected, behavior.[35]

Moreover, publicizing these results may tend to reinforce unconscious racialized triggers. From a psychological perspective, Professor Freshman suggests it may be more important to pursue policies that lead us to stop thinking about racialized "polka dot elephants" and instead think about multi-racial group affiliations (Let's Go Mets).[36]

Finally, I am chilled to learn that my study caused Professor Case to put off purchasing a car[37]—especially since the overall disparities between white women and white men (the most favored consumer type) were not dramatic. While I hoped to arm consumers with more information with which to protect themselves, there is a real possibility that reporting my results harmed consumers who became more uncertain about whether they were being taken.

All of these concerns suggest that society might be better off with a civil rights version of the "broken windows" strategy. Instead of drawing attention to the real, existing problems, we might do better by papering over the problems. As Dan Kahan has argued in the criminal context, if people believe things are better, we may be able to jump to an equilibrium in which they really are better.[38]

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32. Freshman, *supra* note 3, at 2320.

33. I worried about a similar concern with regard to my "principal audit" proposal—namely, that real estate and employment agents might mistakenly think that there was more demand for disparate treatment if the state started sending faux principals expressing such preferences. AYRES, p. 404.

34. Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333 (2001).

35. A similar issue arose with regard to my publication showing that purchasing Lojack produced dramatic, but largely external, benefits in reducing the chance that other people would have their cars stolen. Ian Ayres & Steven D. Levitt, *Measuring Positive Externalities from Unobservable Victim Precaution: An Empirical Analysis of Lojack*, 113 Q.J. ECON. 43 (1998). At a Yale Law School faculty workshop, I provocatively suggested that it would be immoral for anyone in the audience to purchase a car without installing Lojack, to which my colleague Jules Coleman replied that it was immoral for me to publish the paper because it might make it less likely that hyperrational consumers would take on the cost of purchasing Lojack.

36. Freshman, *supra* note 3, at 2325-28.

37. Case, *supra* note 3, at 2274.

38. *See* Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CAL. L. REV. 1513 (2002); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 391 (1997).

Professor Freshman has raised concerns about the most foundational issues of civil rights policy. Some might respond that as a categorical matter, more information is good. But at this point in my career, this is no time for me to hide behind Kantian arguments.[39] For me the deep question is a consequential one.

One way of combining the Ayres and Freshman approaches would be to strive for "acoustic separation."[40] Government could test and tweak—intervening in markets with nonracial structural reforms (such as markup disclosure or caps) or low-profile racial reforms (enforcing new laws prohibiting discrimination in contracting or affirmative action initiatives)—but try to keep the public from learning about the underlying bases for the interventions. These acoustically separated interventions could take place side by side with Freshmanian interventions to change peoples' preferences.

But in some contexts acoustic separation may not be feasible and the crucial question again arises whether disclosing evidence of discrimination is on net worthwhile. I do not think we have enough information to answer this question definitively. But it seems to me that the answer will at least in part turn on: (1) whether we think disclosure will in turn lead to either effective "market tweaking" or victim self protection; and (2) whether we think nondisclosure will create a greater opportunity for what might be called "preference tweaking."[41]

How would these factors tend to play out in real world settings? Well, in the car setting at least, I think they militate toward disclosure. While I have not been able to identify a unitary cause for the race discrimination in car pricing uncovered in my study, there is evidence that at least part of the disparate racial treatment is caused by dealerships' profit motive to identify those customers who are willing to pay an unusually high markup.[42] Because this theory is driven by profit motive and not racial preference, there is a stronger argument

39. In various contexts, I have proposed, notwithstanding Kant's imperative against lying, that undermining the ability of speakers to credibly communicate might be socially productive. *See* BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002); Ian Ayres & Barry J. Nalebuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631 (1997); Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998); Ayres & D. Levitt, *supra* note 35, at 43; Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales For Mediation*, 80 VA. L. REV. 323 (1994).

40. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 652-58 (1984).

41. If I am a "market tweaker," then Professor Freshman is the consummate "preference tweaker." He has brought to the legal literature deep insights into the new learning of psychology on discrimination.

42. Even if the average African-American purchaser has a lower willingness/ability to pay than the average white purchaser, it can still be rational for the dealership to offer high prices to all African Americans if a larger proportion of black than white purchasers are willing to pay a homerun profit. AYRES, p. 61.

for tweaking the market by convincing lawmakers that there is a real problem to be addressed (and less reason to worry about preference backlash). More generally, the concern with preference backlash, which we have certainly seen in the "special rights" critique of civil rights initiatives, is more likely to be a concern with mandatory diversity training and affirmative action than with disclosing evidence of blatant disparate treatment. The reaction of most viewers to the *PrimeTime Live* pictures of blacks being offered higher car prices or having to wait substantially longer at record or shoe stores is definitely not to characterize African Americans as seeking "special rights." In fact, if anything, depictions of disparate treatment cause previously unconvinced whites to reframe "special rights" efforts as having instead a "remedial" nature.

These arguments respond to some, but not all, of Professor Freshman's concerns. There is still the possibility that disclosure of discrimination evidence will exacerbate the racialized psychological triggers of decisionmakers or harm the victim by creating penumbral uncertainty about when discrimination actually takes place. Furthermore, it is rare that scholarship ever leads to actual market tweaking by legislatures. Ultimately, the case for disclosure may turn on whether it will allow potential victims to protect themselves—by patronizing a no-haggle dealership or by adopting more-anonymous forms of purchasing (such as an Internet service).[43] While this discussion makes some qualitative progress on whether publicizing results will be socially beneficial, it is not sufficient to produce a definitive conclusion about whether disclosure in a particular context is apt. I am somewhat chilled by this conclusion.

CONCLUSION

Stepping back, I would like to thank Professor Freshman for taking so much time to organize this Symposium, which has meant so much to me. At the Law and Society Panel where we originally gathered to discuss these books, I found myself on the verge of tears to hear the byproduct of such close and engaged readings of this multi-year effort. And Jerome Culp's powerful discussion of his own experience attempting to qualify for a renal transplant brought home to me in a very personal way the continuing value of CRS narrative.

As we move forward with these conversations, we should strive to listen to even more voices. Professor Freshman has already succeeded in creating a wonderful soup of perspectives, but we should also include scholars of diverse

43. There is strong evidence that Internet car purchasing services yield greatly reduced racial disparities in automobile pricing. *See* Fiona M. Scott Morton, Florian Zettelmeyer & Jorge Silva-Risso, *Consumer Information and Price Discrimination: Does the Internet Affect the Pricing of New Cars to Women and Minorities?*, *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=288527 (Jan. 2002).

quantitative backgrounds. Sociologists tend to crunch numbers differently than economists who crunch them differently from psychologists and political scientists. Methodological consilience in the social sciences is long overdue.[44]

And finally, the conversation could be improved by including a different type of critical approach. None of the participants were well suited to bring forward a particularly conservative critique. To varying degrees, it is my sense that we are all friends, not only of Clark, but also of particular types of affirmative action. To be sure, it is worthwhile for politically sympathetic scholars to push each other. But there comes a time when it is also appropriate to open the debate to people who support a much more conscribed vision of civil rights.

44. *See* EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 181-209 (1998).

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